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No. 87-938

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,
Petitioner,

- v. -

THE BANK OF NEW ORLEANS AND TRUST CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY MEMORANDUM

I. PRELIMINARY STATEMENT

When respondent's arguments are parsed, it is evident that they demonstrate a need for granting this writ of certiorari. The issue, so sharply put in focus by respondent's brief in opposition ("Opp. Br."), is extremely narrow yet it has widespread significance concerning the effective administration of Rule 56. Succinctly put, in what circumstances is a movant deemed to have met its initial burden so as to shift the burden to go forward to the nonmovant?

Here, petitioner demonstrated that the complaint was time-barred on its face -- thus, establishing its *prima facie* case. However, both the Fifth Circuit and respondent erroneously maintain that the establishment of a *prima facie* case is not enough and that a movant must go further and also negate all possible "defenses" that respondent might conjure up.

The decision thus reaches well beyond cases involving the particular aspect of Louisiana solidary liability at issue here, and has broad application to all cases involving the affirmative pleading by a party of a condition enabling or entitling a claim to proceed when the party seeking summary judgment has demonstrated from the face of the pleading (or otherwise) that the claim is defective. Such cases routinely involve issues as diverse as a plaintiff's invocation of the long-established federal equitable tolling doctrine or damages suits against government entities after filing a notice of claim or exhausting administrative remedies. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (federal equitable tolling doctrine).

Thus, to use a typical example indistinguishable from this case and which is common in the federal courts, a plaintiff invoking the federal equitable tolling doctrine to avoid a statute of limitations bar has the burden of pleading and proving the doctrine. *E.g., Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978). Absent such allegation and proof, the claim is time-barred on the face of the pleading and the defendant is entitled to judgment as a matter of law. The Fifth Circuit decision would place the burden on a defendant at the summary judgment stage to negate or disprove the facts upon which the tolling doctrine presumably is based -- even before the

plaintiff invoking the doctrine has shown any evidence exists to support the theory and despite the plain fact that the filing date itself establishes a *prima facie* limitations bar on the face of the pleading.

This result hardly comports with established precedent requiring the party seeking to toll the statute of limitations to plead *and* prove the doctrine. In these and like cases, the Fifth Circuit's decision will thus have great impact, the significance of which requires careful consideration by the Court. The broad reading of the Fifth Circuit's erroneous decision evidenced by BNO's argument warrants that the Court grant review to correct the misapprehension of the burden of proof and burden shifting issues of Rule 56 and to refine its holding in *Celotex* to assure the efficacy of summary motions as intended by the Court.

II. ARGUMENT

BNO acknowledges its complete failure despite over two years of discovery to produce any evidence to support its theory of solidary liability or the applicability of its prescription-interruption argument. To excuse this conceded failure, BNO asserts that it "was not required to submit any evidentiary proof regarding the issue of solidary liability," Opp. Br. at 5, because Arthur Young "failed to present evidence negating its solidary liability . . . thereby totally ignor[ing] its [summary judgment] burden of proof." Opp. Br. at 13.

BNO's argument misperceives the initial burden imposed on a party moving for summary judgment and the manner in which that burden may be met. In so doing, BNO ignores the showing made by Arthur Young

in support of its summary judgment motion and misapprehends the holding of *Celotex*.

ARTHUR YOUNG MET ITS INITIAL BURDEN OF PROOF

BNO's core argument is that Arthur Young did not present any evidence in support of its summary judgment motion to show that it was not liable *in solido*. Opp. Br. at 12-13. *Ergo*, BNO asserts, Arthur Young failed to meet its initial burden to inform the court of the basis for its motion and to identify those parts of the pleadings or other documents which demonstrate the absence of any genuine issue of material fact. Opp. Br. at 5-6.

BNO is simply wrong.[1] Arthur Young specifically met its initial burden under *Celotex* and Rule 56 by coming forward and (1) establishing that on the face of BNO's pleading filed in 1984 (and deemed filed in 1983)[2] the limitations period had expired before suit was filed and (2) providing undisputed record evidence of BNO's knowledge of a purported claim more than one year prior to filing.[3] *Celotex* expressly held that among the ways a

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1 BNO also states erroneously that Arthur Young did not address its initial burden as the movant in its Petition. Opp. Br. at 11. Arthur Young specifically addressed its initial burden and the manner by which it was met. Petition at 11-12.

2 Arthur Young also pointed to the parties' agreement drafted at the request of BNO and providing that any claim that had expired by August 10, 1983 could not be revived. Although the agreement acted to preclude BNO's claim, the Fifth Circuit disregarded it.

3 This second aspect was not addressed by the Fifth Circuit and is not at issue on this Petition.

movant can carry its burden is by relying on the pleadings. 106 S. Ct. at 2553. In this case Arthur Young did so by reference to BNO's own complaint and the *prima facie* bar apparent from its filing date and the corollary allegations of Arthur Young's alleged wrong in connection with its 1980 audit. In this manner, Arthur Young established that BNO's claim was time-barred on its face and shifted the burden to BNO so that unless BNO came forward with some evidence to overcome the obvious statute of limitations bar, Arthur Young was entitled to summary judgment. Since BNO failed to adduce any such evidence and to carry its burden, Arthur Young was not obligated to do anything more. Arthur Young thus met its initial burden under Rule 56 and *Celotex* in every respect and was entitled to judgment.

BNO repeatedly refers to and relies on the dissenting opinion in *Celotex* to support its argument. *See* Opp. Br. at 7-9. BNO ignores, however, the majority's specific holding that "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 106 S. Ct. at 2554. Arthur Young did precisely that by relying on the *prima facie* bar evident from its adversary's pleading and BNO's conceded failure to produce any contrary evidence.

Moreover, Arthur Young was not required, as BNO contends, to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 2553. In the face of the patent limitations bar established by the complaint itself, *Celotex* required that BNO and not Arthur Young present sufficient evidence to show that Arthur Young was solidarily liable with the other defendants, *i.e.*, that BNO's loss was caused by the concurring tortious acts of Arthur Young and the other

defendants. *See* Petition at 13. BNO's attempt to place this burden on Arthur Young is contrary to the explicit holding of *Celotex* and the import of Rule 56.

III. CONCLUSION

Petitioner respectfully submits that when it demonstrated from the face of the pleading that the claim was barred, it met its initial burden under Rule 56 and the burden of negating such *prima facie* showing then shifted to the nonmovant. The very arguments presented by BNO founded on the dissent in *Celotex* and the erroneous Fifth Circuit decision demonstrate the failure of lower courts and litigants to recognize and understand the crucial burden shifting issues raised by Rule 56. Such error and potential for future error by other federal courts warrant this Court's review of the Fifth Circuit's decision.

Dated: January 25, 1988
New York, New York

Respectfully submitted,

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